LIBRARY
SUPREME COURT U.S.

Office - Supreme Court, U.S.
FILED
DEC 2 1957
JOHN T. FEY, Clerk

No. 98

# In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM V. MASSEI

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
*Solicitor General,*
CHARLES K. RICE,
*Assistant Attorney General,*
EARL E. POLLOCK,
*Assistant to the Solicitor General,*
JOSEPH F. GOETTEN,
JOHN J. McGARVEY,
*Attorneys,*
*Department of Justice, Washington 25, D. C.*

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| The evidence | 4 |
| The charge | 15 |
| The decision below | 18 |
| Summary of argument | 21 |
| Argument | 23 |
| I. The court below erred in holding that proof of a likely source of unreported income is an indispensable element of the net-worth method in any of its applications | 25 |
| A. Proof of a likely source is only one of alternative methods of supporting the inference that the net-worth increases are attributable to currently taxable income | 25 |
| B. The Government's evidence in this case was ample to support the inference that the net-worth increases are attributable to currently taxable income | 30 |
| II. The court below erred in holding that respondent's admissions of graft-taking in pre-indictment years should have been excluded | 34 |
| A. The admissions were relevant | 34 |
| B. The admissions were corroborated | 37 |
| Conclusion | 40 |


448548—57——1

## CITATIONS

Cases:


| | Page |
|---|---|
| *Bracey* v. *United States*, 142 F. 2d 85, certiorari denied, 322 U. S. 762 | 35 |
| *Friedberg* v. *United States*, 348 U. S. 142 | 24 |
| *Hasson* v. *Commissioner*, decided May 16, 1955 (T. C.) | 25 |
| *Hasson* v. *Commissioner*, 239 F. 2d 778 | 25, 28 |
| *Holland* v. *United States*, 348 U. S. 121 | 21, 24, 26, 27, 28, 30, 33 |
| *Laughinghouse* v. *Commissioner*, 227 F. 2d 477 | 25 |
| *Opper* v. *United States*, 348 U. S. 84 | 37, 39 |
| *Pate* v. *Commissioner*, decided March 29, 1957 (T. C.) | 25 |
| *Phillips' Estate* v. *Commissioner*, 246 F. 2d 209 | 31 |
| *Smith* v. *United States*, 348 U. S. 147 | 24, 37, 38, 39 |
| *Thomas* v. *Commissioner*, 232 F. 2d 520 | 24, 26 |
| *Thomas* v. *Commissioner*, 223 F. 2d 83 | 25, 28 |
| *United States* v. *Adonis*, 221 F. 2d 717 | 25, 28, 29, 30, 32 |
| *United States* v. *Calderon*, 348 U. S. 160 | 24, 37, 38, 39 |
| *United States* v. *Donovan*, 142 F. Supp. 703 | 24 |
| *United States* v. *Ford*, 237 F. 2d 57, certiorari granted, 352 U. S. 1000, indictment dismissed as moot, November 18, 1957 | 24, 28, 29, 30, 33 |
| *United States* v. *Johnson*, 319 U. S. 503 | 24, 33 |
| *United States* v. *O'Malley*, 131 F. Supp. 409 | 24 |


Statutes:


| | |
|---|---|
| Internal Revenue Code of 1939, Section 145 (b) (26 U. S. C. 1952 ed., Sec. 145 (b)) | 2 |

# In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 98

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM V. MASSEI

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 795–810) are reported at 241 F. 2d 895.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1957. (R. 811.) On March 29, 1957, by order of Mr. Justice Frankfurter, the time for filing a petition for certiorari on behalf of the United States was extended to and including April 8, 1957. (R. 811–812.) The Government's petition for certiorari was filed on April 5, 1957, and was granted on May 20, 1957. (R. 812.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether the court below erred in holding that, in a tax evasion prosecution based on the net-worth method, proof of a likely source of the respondent's net-worth increases is an indispensable element of the Government's burden.

2. Whether the court below erred in holding that the trial judge should have excluded extrajudicial admissions by respondent, a public official, that he had taken graft in pre-indictment years.

## STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U. S. C. 1952 ed., Sec. 145.)

## STATEMENT

On February 16, 1953, an indictment in five counts was returned against respondent in the United States

District Court for the District of Massachusetts, charging wilful attempted evasion of income tax due and owing by himself and his wife for each of the years 1946 through 1950, in violation of Section 145 (b) of the Internal Revenue Code of 1939. (R. 4–8.) The amounts of respondent's reported and correct net income and tax liability, as alleged in the indictment, were as follows:

| Year | Reported | | Correct | |
|---|---|---|---|---|
| | Income | Tax | Income | Tax |
| 1946 | $3,232 | $361 | $29,158 | $11,474 |
| 1947 | 3,539 | 416 | 12,336 | 2,990 |
| 1948 | 4,549 | 501 | 6,322 | 881 |
| 1949 | 4,504 | 549 | 11,131 | 1,880 |
| 1950 | 6,031 | 862 | 37,646 | 11,467 |

The Government's case was based upon the net-worth method of proof. The bill of particulars (R. 13–14) which was filed in compliance with an order of the District Court recited, in effect, that "[t]he likely source" of the alleged unreported income was graft.[1] After a jury trial, respondent was found

[1] The bill of particulars reads, in part, as follows (R. 13):

1. The likely source of unreported income of the defendant is moneys received by the defendant as an individual from many persons engaged in various illegal activities for the performance by the defendant of his official duties as a member of the Worcester Police Department, for the non-performance by the defendant of his official duties as a member of the Worcester Police Department, and for the performance by the defendant as a member of the Worcester Police Department of services rendered to such persons in connection with such illegal activities.

guilty as charged. (R. 757–758.) On May 8, 1956, he was sentenced to imprisonment for two years and fined $5,000. (R. 787.)

The Court of Appeals, with Judge Woodbury dissenting, reversed the judgment of conviction on the ground that the prosecution failed to prove a likely source of unreported income to which the net-worth increases could be attributed, and that, accordingly, respondent's motion for judgment of acquittal should have been granted. (R. 795–809.) The majority of the court below held that proof of a likely source of unreported income is "an indispensable element" of the Government's burden in a net-worth case (R. 802–803); that here "the only direct evidence of likely source" consisted of proof of extra-judicial admissions by respondent that he had taken graft in pre-indictment years (R. 804); and that these admissions were uncorroborated and, as such, could not serve as proof of an essential part of the prosecution's case (R. 802). The court further held that the evidence relating to the admissions should have been excluded as irrelevant. (R. 804–806.)

## THE EVIDENCE

The evidence adduced by the Government was largely undisputed and may be summarized as follows:

Respondent was a member of the police department of the City of Worcester, Massachusetts, from 1923 until his retirement in 1951. He was promoted to sergeant in 1939 and lieutenant in 1947. Prior to 1940, his principal duty assignments were with the motorcycle patrol and the vice squad. From 1940

until June 1943, he was in charge of the vice squad. Thereafter, he served as personnel officer and as license board officer. One of his duties as personnel officer was to see that patrolmen carried out their assignments. As license board officer, he investigated and passed upon all applications for licenses to operate taxi cabs, gas stations, and parking lots. (R. 200–221.) Prior to 1937, respondent's salary as a police officer did not exceed $2,184 a year (R. 457), and from 1937 through 1945, it ranged from $2,184 to $2,850 (R. 222–223). During the indictment years, his salary increased from $2,850 in 1946 to $4,080 in 1950. (R. 223–224.)

Respondent was born in 1895. (R. 190–191.) From 1916 until his appointment to the police force in 1923, his earnings ranged from $1,800 to $2,750 a year. (R. 457.) In 1933 he married Isabel Cummings, who was then 22 years old. (R. 136, 225, 253–254.) From 1929 until her marriage in 1933, Isabel was employed by the City of Worcester at a salary of $18 to $20 a week. (R. 225.) She was not gainfully employed and had no independent income after marriage. (R. 136, 190, 254.) She never received any gifts or inheritances. (R. 456.) Respondent did not receive any gifts or inheritances at any time, other than a one-half interest in a three-tenement house which he inherited from his father, Pilate Massei, who died in February 1949. The estate of Pilate Massei is referred to more particularly hereinafter.

Respondent filed an income tax return for the year 1920 reporting a tax liability of $19.79. (R. 113.) There was no record of a return filed by him for any

of the years 1921 through 1939[1] (R. 118). For the years 1940 through 1944, he reported a tax liability in the amount of $24.30, $126.48, $304.03, $320.78, and $174.60, respectively. (R. 116–117.) For the year 1945, he reported a gross income of $6,009, including (in addition to his salary) dividends, interest, and other income totaling $2,985, and a tax liability of $1,122. (R. 99–100.)

In years prior to 1946, respondent and his wife deposited in banks and expended sums greatly in excess of his salary and reported income. For example, during a nine month period in 1932 and 1933, respondent purchased securities at a cost of more than $3,200 (R. 153); in March 1939, his wife opened an account in the Worcester Mechanics Savings Bank with a deposit of $1,830 (R. 131); and in 1945, respondent purchased two paid-up retirement annuity contracts from the John Hancock Mutual Life Insurance Company at a total cost of $27,668 (R. 258–265). As of the beginning of the prosecution period, respondent and his wife had accumulated, and he was credited with, a net worth of some $61,000, consisting of cash in banks, $16,006; United States Saving bonds, $16,706; the aforementioned annuity contracts, $27,668; and an automobile, $700. (R. 497–500.)

During the prosecution years (1946–1950), the net worth of respondent and his wife increased from $61,000 to $149,000, largely reflected in cash expenditures for the purchase of paid-up annuity policies, se-

[1] Prior to 1939, respondent's salary as a municipal employee was exempt from the federal income tax.

curities, land, and automobiles, and for the construction of a house. These cash expenditures could not be traced by the agents to any specific source. (R. 497–516.) The assets and liabilities included in the net-worth statement were established by third party testimony and records and were not disputed by respondent. (R. 528–529, 696.) Special Agent Hurst testified that, based upon the increases in net worth plus nondeductible expenditures disclosed by the evidence, respondent's true net income for the years 1946 through 1950 was $29,658, $11,583, $7,967, $11,127, and $37,199, respectively, whereas he reported net income of $3,232, $3,539, $4,549, $4,504, and $6,031, respectively. (R. 502, 504, 507, 509–510, 512.) Revenue Agent Calatrello testified that respondent's correct tax liability for the same years was $11,474, $2,538, $1,035, $1,879, and $11,251, respectively, whereas he reported a tax due of $361, $416, $477, $549, and $862, respectively.[3] (R. 598–599.)

The investigation of respondent's tax liability was commenced in November 1951. (R. 420.) Throughout the course of the investigation and while the case was pending in the Treasury Department, respondent was represented by attorney W. Arthur Garrity. (R. 303, 311, 315.) The agents had direct contact with respondent on only one occasion. (R. 553.) Garrity, who advised the agents early in the investigation (R. 451) that he would "procure the complete picture of the [respondent's] finances," secured from respond-

[3] The Government's net-worth computation, Ex. 44 for identification, is reproduced at R. 775.

ent and submitted to the agents substantially all the information and data requested by them. (R. 449–460, 473–481, 534, 648–653, 622–623, 628–629.) In Garrity's words (R. 433), "he wished to disclose everything."

Among other things, the agents requested information with respect to the receipt at any time of gifts or inheritances by respondent and his wife. The only lead forthcoming from these inquiries during the investigation was that in 1949 respondent inherited from his father the one-half interest in the tenement house. (R. 450–456, 665–666.) The investigation included an analysis of the bank and brokerage accounts of respondent and wife, an examination of public and third-party records, and interviews with persons who had financial transactions with respondent or who were in a position to throw light on his financial history and mode of living. The agents nevertheless failed to uncover any nontaxable receipts which could account for the assets reflected in the net-worth determination. (R. 420–516, 564–570.)

The only occasion on which the agents had direct contact with respondent was on November 27, 1951, when the latter opened his safe deposit box in a Westerly, Rhode Island, bank in the presence of Agents Hurst and Calatrello and his attorney Garrity. (R. 553.) The agents had made arrangements with Garrity to inventory the contents of the box. (R. 436.) In the course of dictating an inventory of the contents of the box to Calatrello, Hurst turned to respondent and asked him (R. 600) "the source of the funds that were used to acquire the various assets".

Respondent replied that "the funds came from many different people," whereupon Garrity broke into the conversation and stated that respondent "got these funds during prohibition days when he let the [liquor] trucks roll through Worcester". Respondent then picked up the conversation again and said that "he got the funds in the nature of a gift and therefore he didn't report it or he didn't think it was taxable". (R. 436–437, 565–566, 600.)

On two other occasions during the investigation, when respondent was not present, one in November or December 1951 and the other in January 1952, Garrity stated to Agent Hurst in the latter's office that respondent had taken graft when he was a motorcycle patrolman during prohibition days and when he was a member and later head of the vice squad. (R. 461–462, 471–473, 485–487.) Hurst testified that at the meeting on January 24, 1952, Garrity said (R. 471) that "the money that showed up on the net worth statement had been accumulated [by respondent] prior to 1945", and that respondent "had received gifts, or graft, or call it what you will, when he was a patrolman on Shrewsbury Street between 1923 and 1931, while letting liquor trucks roll through Worcester, and when he was on the Vice Squad between 1933 and 1943."[4] Similar statements were

[4] Garrity also stated on this occasion (R. 471) that respondent "probably would be willing to pay the deficiencies found by the Revenue Agent". Immediately upon receipt of notice that his tax returns were under investigation, and after making the necessary arrangements through his attorney Garrity, respondent deposited with the then Collector of Internal Revenue the sum of $84,500 in cash to be held by the Collector in a

made by Garrity on May 20, 1952, at a conference in the Office of Regional Counsel, Internal Revenue Service, at which Garrity, Assistant Regional Counsel Isber, and Special Agent Hurst were present. (R. 576–581, 590.)

The admissions of graft-taking by respondent in pre-indictment years were made in an effort to convince the investigating agents and the Regional Counsel's office that the bulge in respondent's net worth was attributable to a cash hoard accumulated through graft prior to 1945 and not credited by the agents. Early in the investigation, Garrity told the agents (R. 443) that "the $85,000 used [by respondent] to purchase the annuities was on hand in 1945",[8] and in January 1952 he told Agent Hurst (R. 460) that respondent claimed "he had between $100,000 and $110,000 net worth as of—before 1945." Garrity main-

---

suspense account and applied against any deficiency thereafter determined against respondent. This sum represented the proceeds of insurance policies (retirement annuity contracts) which respondent and his wife surrendered in September 1951. (R. 409–417.)

[8] A substantial part of the bulge in respondent's net worth reflected the purchase with cash of paid up retirement annuities policies. The first policies were purchased in 1945 at a cost of $27,668. Additional policies were purchased in 1946 and 1950 at a cost of $26,212, and $29,947, respectively. (R. 258–271, 514–515.) When Garrity was questioned by Isber at the conference in the Regional Counsel's office about respondent's purchase of the annuity policies for cash, Garrity replied (R. 580–581) that "a smart insurance salesman persuaded the [respondent] * * * that this was a good way to hide cash * * * and that cash—if he kept cash at home it could be lost in case of fire or in case he was robbed and in this way nobody could discover the possession of this large amount of cash."

tained that, since respondent was assigned to personnel work and licensing board duties from June 1943 until his retirement in 1951, he was in no position during the prosecution years to receive graft. (R. 473, 483, 488–489, 495, 579–581, 588.) However, the evidence shows that, even if respondent were credited with an opening net worth in the amount claimed, $100,000 to $110,000, as compared with the $61,000 with which he was credited by the prosecution, it would still leave unexplained a net-worth increase during the prosecution years of some $40,000 or $50,000.

It was apparently in recognition of this deficiency that Garrity stated to Isber, at the conference in the Regional Counsel's office, that (R. 581) in February 1949 respondent obtained "X dollars, after the death of his father, who had saved a lot of cash." The testimony of Agent Hurst, who was present at the conference, was that (R. 491) Garrity stated respondent "had received a certain sum of money after the death of his father in 1949" and that no "specific amount [was] named". Respondent's father, Pilate Massei, died testate on February 2, 1949. The will named as heirs respondent, his brother Edward, and his two sisters. A petition for probate of the will and for the appointment of John Bianchi, a nephew of decedent, as executor was allowed on June 1, 1949. No inventory or accounting was thereafter filed for the estate. (R. 230–232.) No information with respect to the estate was on file with the Inheritance Tax Division of the Commonwealth of Massachusetts. (R. 443–444.) In the course of the investigation, Agent Hurst

interviewed Bianchi, the executor of the estate, and Edward Massei, respondent's brother. (R. 445.) Neither had knowledge of any assets of the estate other than the tenement house, a one-half interest in which passed to respondent. Bianchi testified at the trial that he never came into possession of any personal property of the estate, that he had no knowledge of any, and that he did not make any distribution or payment of bequests as directed by the will. (R. 277–280.) Edward Massei testified that the only property he received from his father's estate was a half interest in the aforementioned real estate plus $600 or $700 which was in a bank account in his father's name as trustee for him. (R. 253.)

The evidence relating to the admissions of graft-taking by respondent in pre-indictment years was received over defense objections and after a *voir dire* hearing on the question of the attorney's authority to make admissions binding upon respondent. (R. 322–405.) Respondent objected to the evidence on the grounds that his attorney was not authorized to make the admissions[6] and that, in any event, the evidence was irrelevant and immaterial. (R. 363–366.) The court in admitting the evidence left for the jury, under guiding instructions (R. 732–733), the question of the authority of the attorney to make admissions binding upon respondent[7] (R. 370, 393, 396, 403).

---

[6] Respondent conceded, however, that Garrity had represented him throughout the investigation and while the case was pending in the Treasury Department (R. 292, 311), and that in so doing Garrity endeavored to persuade the Service personnel against recommending criminal prosecution (R. 315).

[7] Initially the court viewed the question of the attorney's authority as one of law. (R. 295–296, 343.)

respondent did not take the stand at the trial. The only witness called by the defense was respondent's former attorney, Garrity, who testified to his version of the conversations with the investigating agents and Assistant Regional Counsel Isber in the course of which the admissions were made. Garrity testified, in substance, that when he referred to graft-taking by respondent in pre-indictment years, he was speaking argumentatively and hypothetically. (R. 621–641.) The question whether Garrity's statements were intended as statements of fact or argument and hypotheses was also left for the jury under guiding instructions. (R. 733.)

At the close of the evidence, respondent moved to strike the testimony relating to the admissions of graft-taking on the grounds that the evidence was incompetent, irrelevant, and immaterial; that it went beyond the scope of the bill of particulars; and that the admissions were uncorroborated. (R. 675.) The motion to strike was denied. (R. 676.)

The defense was twofold: one, that the net-worth increases were attributable to a cash hoard accumulated prior to 1945; and two, that the evidence was insufficient to go to the jury in that the Government failed to prove by direct evidence a likely source of unreported income to which the net-worth increases could be attributed. With respect to the former, the origin of the alleged cash hoard was left unexplained by the defense testimony. As previously noted, Garrity, the only defense witness, testified that, in his conversations with the investigating agents and Isber, his

references to graft-taking by respondent in pre-indictment years were intended as argument and hypotheses and not as statements of fact. (R. 622–636.) In addition, Garrity categorically denied that the agents had questioned respondent about the source of his assets in the course of inventorying the safe deposit box at the Westerly, Rhode Island, bank, and that he and respondent had made the statements attributed to them by the agents. (R. 640, 671.) On cross-examination, Garrity admitted that he had questioned respondent specifically about nontaxable receipts during the prosecution years and that respondent never made any claim to the receipt of such funds. (R. 665–666.)

The main defense contention was that the Government had the burden of proving a likely source of unreported income by direct evidence. This contention was asserted throughout the trial. During the cross-examination of Agent Hurst, defense counsel stated (R. 538) that "the element we are really scrapping about is the source". In his opening statement to the jury, defense counsel argued (R. 610–611) that the Government must establish "the element of source" and that in this case it must do so by evidence of "specific items of unrecorded income". (See also R. 617.) And at the close of the evidence, respondent moved for judgment of acquittal on the grounds that there was a fatal deficiency in the proof in that the prosecution failed to establish by direct evidence a likely source to which the net-worth increases could be attributed. (R. 679–694.)

THE CHARGE

The case was submitted to the jury on alternative theories. The court instructed the jury, in the first instance, that the prosecution had the burden of proving a likely source from which the jury could infer that the net-worth increases sprang; that the prosecution alleged that the source was graft; that there is a presumption that a police officer does not receive illegal payments, but that the presumption is rebutted if the jury should find that respondent admitted taking graft in prior years; and that from the admission of graft-taking in prior years the jury could infer that respondent continued taking graft during the indictment years in view of his continued employment as a police officer, and thus find a likely source of unreported income to which the net-worth increases could be attributed.[5]

---

[5] The charge reads, in part, as follows (R. 731, 734):

Before you make the inference of unreported current income, there are certain conditions that you must be satisfied on. First, the Government must establish beyond a reasonable doubt * * * a likely source—remember what I am saying—a likely source of the alleged income. What, in the exercise of your sound judgment, having in mind probabilities, not dealing with the matter capriciously, what constitutes a likely source of income? In this case there has been no direct evidence of the source of the alleged unreported income. * * * In order for you to find a source, therefore, you have to make several findings. * * * The Government, for example, must negate the possibility that the money reflected by the increase in the net worth came from gifts, loans, inheritances, or savings that were in exist-

In the alternative, with respect to counts 4 and 5 relating to the years 1949 and 1950,* the jury was instructed that, if it resolved the factual questions relating to the admissions in respondent's favor but was satisfied that the Government had established his opening net worth and the subsequent increases therein with reasonable certainty and had negated the possibility of nontaxable receipts during the prosecution

---

ence at the beginning of the period for which the defendant is charged with evasion. * * *

* * * * * *

Now, if you find that the admissions alleged were made, you have to go a step further. Then it becomes your duty to determine if a source is established, because that is what is necessary. Now, I say this advisedly: the source which the Government alleges—and if I am wrong I desire to be corrected—is illegal payments by persons unknown to induce this defendant Massei to perform acts of misfeasance, malfeasance and nonfeasance, to do something that was improper, that was wrong, and that with particular application to the position which he held, a position of a fiduciary nature, a position of a police officer, a member of the police force of the City of Worcester. There is a presumption * * * that a police officer does not receive illegal payments. That is a very, very efficacious presumption, and it would apply to other men holding offices of trust and confidence, but if you find that that presumption had been rebutted, and rebutted by the test that I have given you, has been rebutted, for example, by the admissions made by the defendant, so far as the presumption applies to him, then I charge you that you may infer, having in mind his continued position in the police department, you may infer that continued payments of this sort were a likely source of the increases in net worth reflected by the Government's evidence, if you find that they showed it.

*It may be noted that respondent's sentence (*supra*, p. 4) was less than he could have received on any one of the five counts in the indictment.

years, and if it was satisfied that respondent had fabricated an account of nontaxable receipts from his father's estate in an effort to explain away the net-worth increases, it could then infer that the net-worth increases were attributable to taxable income. The jury was instructed that under these circumstances (R. 744) "the Government is under no obligation to show a likely source".[10]

---

[10] The instruction was as follows (R. 743–744, 755):

I also have to say a few words to you about the other alternative presented by the evidence. If you should find that the alleged admissions were not made, or, if you find that they were made * * * by the attorney without authority from his client, then I charge you that the case stands in this light. If you find the net worth is correct, if you find the increase in net worth is correct as set out, then you are left with the question of source, then you will answer the question of source—I am not charging you now—the only direct evidence of source, except for the statement made by Mr. Garrity to the Internal Revenue Agent was that the defendant received a large sum of cash from his father or his father's estate. That's the only other means of evidence. If you believe this assertion as to source by the defendant, then I must charge you as to the years 1949 and 1950 that the Government has not excluded the possibility that the defendant received money from a non-taxable source and a verdict of not guilty as to these years must be returned; but if you do not believe these assertions by the defendant through his attorney as to source, then I must charge you that as to the years 1949 and 1950 you may infer that the monies reflected by the net worth evidence came from a taxable source.

Now I want to say just one other thing to you. If you find that the story about sums of money, X dollars, coming, allegedly coming from the estate of his father,—if you find that statement was so, that it was made and that it was false, then I am going to charge you, and this would have reference to only one period after the father had

THE DECISION BELOW

The Court of Appeals, with Judge Woodbury dissenting, reversed the judgment of conviction (R. 802). The court acknowledged (R. 797) that "the figures concerning [respondent's] opening net worth and [the] increases in [his] net worth during the prosecution years were sufficiently grounded in the evidence". The court also acknowledged that the prosecution had established expenditures by respondent in pre-indictment years far in excess of his salary and declared income for the same period, and that there was no evidence that respondent or his wife "had ever received" any nontaxable receipts by gift or inheritance. (R. 797.) The majority concluded, however, that the evidence was insufficient to take the case to the jury. The majority reasoned that the Government failed to prove a likely source of income to which the net-worth increases revealed by the evidence could be attributed, and that proof of a likely

---

died,—I am going to charge you that the Government is under no obligation to show a likely source if you find there has been a wilful fabrication.

* * * * *

Now, if you find that the defendant wilfully fabricated through Mr. Garrity an account of the receipt of non-taxable income from the father's estate, and that the defendant intended to convey to the representatives of the Bureau of Internal Revenue that the receipt of non-taxable income from that source materially contributed to his increase in net worth during any of the years named in the indictment, you may then infer that the defendant was concealing the receipt of current taxable income. * * *

source is "an indispensable element of the net worth method in any of its applications" (R. 802).

Having already alluded to the Government's theory that the likely source of respondent's net worth increases was graft (R. 797–798), the majority went on to hold (R. 804) that "the only direct evidence of likely source" was proof of admissions by respondent through his attorney that he had taken graft in pre-indictment years; that (R. 806) "notwithstanding the issue of admissibility, the aforementioned admissions should not have gone to the jury * * * since they were not corroborated"; and that, accordingly, the trial court should have stricken the admissions and granted a judgment of acquittal (R. 808).

In rejecting the Government's contention that the admissions were corroborated by a large body of independent evidence relating to the personal and financial history of respondent and his wife in pre-indictment years, the court observed that (R. 808)—

> Here the admissions of graft as relating to likely source disclosed from where appellant's net worth increases likely came. Only independent evidence of some actual graft taking or, at least, opportunity for graft taking could serve as sufficient corroboration of such admissions. Evidence of unexplained net worth increases does not either bolster the admissions of likely source or establish this element of the crime independent of the admissions, for that evidence, independent of the admissions, does

not tend to prove from where the net worth increases likely issued.

The court below further held (R. 808–809) that the evidence was insufficient to take the case to the jury under the court's charge in the alternative (*supra*, pp. 16–17) with respect to counts 4 and 5 of the indictment. The court disposed of this alternative on the ground that the statements relied upon by the Government to show a fabrication by respondent of nontaxable current receipts did not constitute (R. 809) a "calculated misrepresentation".

The court below also stated that the evidence relating to the admissions should have been excluded as irrelevant, since in its view the evidence lacked probative value on the question of source and had no bearing on the element of intent (R. 804–806), and that consequently (R. 804) "it was error for the district court * * * to charge the jury, as it did, that from the admission of graft taking during preindictment years it could infer [respondent] continued taking graft during the indictment years, and thus find likely source."

In dissenting, Judge Woodbury concluded that the evidence relating to the admissions was relevant; that the admissions were adequately corroborated; and that, in view of respondent's continued employment on the police force, and at higher rank, the admissions, coupled with the proof of unexplained net-worth increases, tended to establish that graft was a

likely source of unreported income. (R. 809–810.) Judge Woodbury observed (R. 810):

> Here the evidence of prior graft as a police officer is so logically relevant to prove a continuing source of unreported income that I think the court not only did not abuse its discretion in admitting the evidence but was quite right in doing so. It seems to me that proof of substantial increases in net worth during the prosecution years, coupled with evidence of a thorough but fruitless search for a non-taxable source for those increases, served the dual purpose of providing adequate corroboration for the admissions of graft taking during pre-prosecution years and in addition warrants the inference that the appellant continued to take graft during the years covered by the indictment. * * * I think there can be little doubt that opportunities for graft exist whatever a police officer's assignments or rank may be. Indeed, with higher rank the opportunities probably would increase. I would affirm on the general line of reasoning followed by Judge Hincks in *United States* v. *Ford,* 237 F. 2d 57 (C. A. 2, 1956).

## SUMMARY OF ARGUMENT

### I

A. The court below erred in interpreting this Court's decision in *Holland* v. *United States,* 348 U. S. 121, as laying down the requirement that proof of a likely source of unreported income is an indispensable element of the net-worth method in any of its applications. The *Holland* decision requires only that

there must be evidence to support the inference that the net-worth increases are attributable to currently taxable income, rather than to nontaxable receipts. Proof of a likely source is only one of several permissible methods of supporting that inference, as the Courts of Appeals for the Second and Third Circuits have held in affirming convictions based on the net-worth method.

B. In the instant case, the Government's evidence, with or without the evidence adduced as to likely source, was ample to support the inference that respondent's net-worth increases were attributable to currently taxable income. This evidence followed three lines of proof: first, there was a large body of evidence revealing a thorough but fruitless search for nontaxable receipts which could account for the increases in net worth; secondly, there was affirmative evidence indicating a consciousness of guilt; and thirdly, there was affirmative evidence tending to show that graft was a likely source of respondent's newly found wealth. It may be argued that any one of these lines of proof was alone sufficient to make a legally acceptable showing. Considered in their totality, however, the proofs were more than sufficient to warrant submitting the case to the jury. And this would be true even without the third category—*i. e.*, evidence as to source.

## II

The court below erred in holding that admissions by respondent that he took graft in pre-indictment

years should have been excluded as (a) irrelevant and (b) uncorroborated.

A. The admissions were relevant since under the circumstances the evidence of graft-taking was so connected with the crime of tax evasion that proof of one incidentally involved the other. The admissions not only tended to explain the circumstances of the crime charged but also, to the extent that the admissions tended to show a likely source of unreported income, they constituted evidence supporting the inference that respondent's net worth increases were attributable to taxable income. Here the proofs showed a predisposition and the continued opportunity for graft-taking, coupled with a remarkable contemporaneous increase in net worth.

B. The admissions by respondent that he took graft in pre-indictment years were adequately corroborated by independent evidence relating to his personal and financial history in the pre-indictment years. The trustworthiness of the admissions could hardly be established by more convincing evidence than the proof of deposits and expenditures by respondent in pre-indictment years greatly in excess of his available resources; in fact, as the court below held, the evidence convincingly establishes an opening net worth of some $61,000 at the beginning of the prosecution period.

## ARGUMENT

In 1954 the Government's use of the net-worth method of proof in prosecutions for tax evasion was considered and approved in a series of four decisions

by this Court."[11] *Holland* v. *United States,* 348 U. S. 121; *Friedberg* v. *United States,* 348 U. S. 142; *Smith* v. *United States,* 348 U. S. 147; and *United States* v. *Calderon,* 348 U. S. 160. In the *Holland* case, the Court reviewed "the general problems implicit in this type of litigation" and laid down requirements for the use by the Government of net-worth proof in criminal cases. In the companion *Smith* and *Calderon* cases, the Court dealt with the problem of corroboration of statements made by the taxpayer to investigating agents and relied upon by the Government to establish vital links in its proof.

A conflict has now arisen in decisions of the lower federal courts, in both criminal and civil tax cases, on the question whether this Court, in *Holland,* laid down the requirement that proof of a likely source of unreported income is an indispensable element of the net-worth method. The Court of Appeals for the First Circuit has answered this question in the affirmative in both criminal (here) and civil (*Thomas* v. *Commissioner,* 232 F. 2d 520) cases. See also *United States* v. *O'Malley,* 131 F. Supp. 409 (E. D. Pa.); *United States* v. *Donovan,* 142 F. Supp. 703 (E. D. Va.). Its decisions in this respect are in conflict with decisions of the Courts of Appeals for the Second, Third, Fifth, and Sixth Circuits. See *United States*

[11] In an earlier decision, *United States* v. *Johnson,* 319 U. S. 503, this Court approved the use of the net-worth method in a prosecution for tax evasion to support the inference that the taxpayer, owner of a vast and elaborately concealed network of gambling houses, had received unreported income in a substantial amount.

v. *Ford*, 237 F. 2d 57 (C. A. 2d), certiorari granted, 352 U. S. 1000, indictment dismissed as moot, November 18, 1957; *United States* v. *Adonis*, 221 F. 2d 717 (C. A. 3d); *Laughinghouse* v. *Commissioner*, 227 F. 2d 477 (C. A. 5th); *Thomas* v. *Commissioner*, 223 F. 2d 83 (C. A. 6th); *Hasson* v. *Commissioner*, 239 F. 2d 778 (C. A. 6th). The Tax Court has also expressed the view that proof of a likely source is not an indispensable element of the net-worth method.[12]

The Government respectfully submits that the court below erred in holding (1) that proof of a likely source of unreported income is "an indispensable element of the net-worth method in any of its applications"; and (2) that extra-judicial admissions by respondent that he had taken graft in pre-indictment years were irrelevant and uncorroborated.

## I

### THE COURT BELOW ERRED IN HOLDING THAT PROOF OF A LIKELY SOURCE OF UNREPORTED INCOME IS AN INDISPENSABLE ELEMENT OF THE NET-WORTH METHOD IN ANY OF ITS APPLICATIONS

#### A. PROOF OF A LIKELY SOURCE IS ONLY ONE OF ALTERNATIVE METHODS OF SUPPORTING THE INFERENCE THAT THE NET-WORTH INCREASES ARE ATTRIBUTABLE TO CURRENTLY TAXABLE INCOME

In reversing the judgment of conviction on the ground that the evidence was insufficient to take the

---

[12] *Pate* v. *Commissioner*, decided March 29, 1957 (1957 P-H T. C. Memorandum Decisions Service, par. 57,059); *Hasson* v. *Commissioner*, decided May 16, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55, 121), affirmed, 239 F. 2d 778 (C. A. 6th).

case to the jury, the court below[13] (R. 802–803) based its decision on the premise that this Court's decision in *Holland* v. *United States*, 348 U. S. 121, requires proof of a likely source of unreported income as "an indispensable element of the net-worth method in any of its applications." It is submitted that in so holding the court below has misinterpreted the *Holland* decision.

This Court ruled in *Holland* that there are two essential requirements to the use by the Government of the net-worth method of proving unreported income in a prosecution for tax evasion. In the language of *Holland* (pp. 132, 137), the first "essential condition * * * is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets"; the second is "*evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income*". (Emphasis added.) In laying down these basic requirements, the Court pointed out (pp. 135–136) that the cogency of the Government's proof in a net-worth prosecution "depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt", and it placed upon the prosecution the burden of showing an investigation into the validity of "relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true,

[13] In this respect the court below followed its earlier decision in *Thomas* v. *Commissioner*, 232 F. 2d 520, a civil fraud case involving use of the net-worth method.

would establish the taxpayer's innocence"—or risking a directed verdict.

In the *Holland* case (pp. 137–138), this Court found cogent evidence to support the inference that the increases in the taxpayers' net worth were attributable to currently taxable income in the proofs that the taxpayers had not recorded all the income from their hotel business and that the business was "capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases". After reviewing this evidence, the Court observed (pp. 137–138):

> Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, *is sufficient.* [Emphasis added.]

It is the above quoted passage in the opinion which the court below interprets as holding that proof of a likely source of unreported income is an indispensable element of the net-worth method in any of its applications.

We think it is clear, not only from the plain meaning of the language quoted but from the context as well, that this Court laid down no such injunction in *Holland.* What *Holland* teaches is that the prosecution must adduce *evidence to support the inference,* which the jury is asked to draw, that the increases in the defendant's net worth are attributable to taxable income, rather than to nontaxable receipts (such as

gifts, loans, inheritances, and the like). What *Holland* holds, in this regard, is that proof of a likely source of unreported income "is sufficient" evidence to support the inference. The language which the court below relies upon was not a statement of requirements but rather a statement descriptive of the proofs which in that case the Court found sufficient to satisfy the requirement. At no point in the opinion does the Court suggest, much less hold, that proof of a likely source of unreported income is "indispensable" to the use of the net-worth method. See *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2d); *United States* v. *Adonis*, 221 F. 2d 717 (C. A. 3d); *Hasson* v. *Commissioner*, 239 F. 2d 778 (C. A. 6th); *Thomas* v. *Commissioner*, 223 F. 2d 83 (C. A. 6th).

It is true that, in a large number of cases, proof of a likely source of unreported income provides (or helps provide) the necessary evidence which will support the inference that the defendant's net-worth increases—current receipts—are attributable to taxable income. But it does not follow that such proof is always indispensable to satisfy the requirement. On the contrary, there are other items of evidence and lines of proof, both affirmative and negative in character, which "may have equal or greater probative value as circumstantial indication that the newly available funds were taxable income." *United States* v. *Adonis*, 221 F. 2d 717, 719 (C. A. 3); *United States* v. *Ford*, *supra*.

In *Ford* and *Adonis*, the Courts of Appeals for the Second and Third Circuits, respectively, affirmed judgments of conviction for income tax evasion based

upon net-worth evidence in the absence of proof of a likely source. In *Ford* the Court of Appeals for the Second Circuit held (p. 65) that proof of a likely source "is not always an indispensable element in a net worth case". Accordingly, it concluded that, "without proof of a likely source", the Government's evidence was "fully adequate to support a finding that the defendant had substantial unreported receipts during the indictment years from some source", and that "all that was needed to complete a *prima facie* case was enough proof to negative the possibility that the unreported current receipts thus established were nontaxable." The latter requirement, in the Second Circuit's view, was satisfied by the evidence of the Government's "exhaustive investigation of the defendant's affairs" which "warranted an inference that he had no nontaxable income during the indictment years not credited to him" by the Government.

In *Adonis* the Court of Appeals for the Third Circuit held (p. 719) that the *Holland* decision "does not say such proof of a likely source is the *only* additional evidence which will suffice to establish the government's case in a situation of this kind." (Emphasis added.) There, the court found the additional evidence in proof that defendant had "wilfully fabricated an account of current non-taxable receipts" in an effort to explain away the net-worth increases firmly embedded in the evidence. In this connection, the court observed (p. 719): "* * * if the jurors were convinced that the taxpayer had thus wilfully fabricated an account of current non-taxable receipts to explain his * * * affluence [in the taxable period] they might reasonably

infer that such conduct was an effort to conceal the fact and real sources of taxable gain * * *. It is this logical inference from the taxpayer's own wilful misrepresentation upon which the government relies here to supply the evidentiary requirement which in other situations is filled by an inference from an affirmative showing of some likely source of income."

B. THE GOVERNMENT'S EVIDENCE IN THIS CASE WAS AMPLE TO SUPPORT THE INFERENCE THAT THE NET-WORTH INCREASES ARE ATTRIBUTABLE TO CURRENTLY TAXABLE INCOME

As in *Ford* and *Adonis,* here too the Government's evidence was more than sufficient (whether considered with or without the evidence as to source) to meet the *Holland* requirement of "evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income." As to the other *Holland* requirement, it should be noted that the court below (R. 797), as did the trial judge, recognized that respondent's opening net worth, and the subsequent increases therein during the prosecution years, had been established with reasonable certainty.

The evidence to support the inference that respondent's net-worth increases were attributable to taxable income followed three lines of proof. First, there was a large body of evidence (*supra,* pp. 7–8, 11–12) of a negative character revealing a thorough but fruitless search by the agents for nontaxable receipts which could account for the bulge in respondent's net worth. In an effort to track to a source the funds used to acquire the various assets, the investigating agents (among other things) painstakingly analyzed the several bank and brokerage accounts of respondent and

his wife, and interviewed persons who had financial transactions with respondent or who were in a position to throw light on his personal or financial history, including his brother and the executor of his father's estate. They also examined numerous public and third party records. Their task in this respect was not an easy one since respondent dealt largely in cash which "leaves no telling prints to track from whence it came." *Phillips' Estate* v. *Commissioner*, 246 F. 2d 209, 213 (C. A. 5th). Moreover, when the investigating agents inquired concerning the respondent's possible receipt of gifts or inheritances, the agents were told only that respondent had inherited a one-half interest in a house from the estate of his father who died in 1949. Although during the investigation respondent did not claim to have received any cash or other property from his father's estate,[14] the agents nonetheless ran down this lead to possible nontaxable receipts with negative results. Also very pertinent in this regard is the testimony of the attorney Garrity, who had represented respondent throughout the investigation, and who had secured from him and submitted to the agents the information and data requested by them. Garrity admitted on cross-examination that during the investigation he had questioned respondent specifically about nontaxable receipts and that respondent (R. 666) "did not tell [him] of any."

---

[14] As pointed out *supra*, pp. 11-12, after the completion of the investigation but prior to the recommendation of criminal proceedings, respondent did make a claim (never substantiated) of a cash inheritance of an unspecified amount.

This category of evidence, we think, was sufficiently strong to warrant the conclusion by the jury that, all reasonable inquiry having been made without discovery of any credible evidence of substantial nontaxable receipts, there was none, and that consequently the net-worth increases must be attributable to unreported taxable income. But, strong as this evidence may be, the Government's case does not rest solely on the inferences to be drawn from proof of a negative character.

Secondly, there was affirmative evidence indicating a consciousness of guilt. The proofs tended to show that respondent had intentionally fabricated an account of nontaxable receipts—"a certain sum" of cash—from his father's estate in an effort to explain away the increases in his net worth for 1949 and 1950. We think the court below (R. 808–809) placed undue emphasis on the fact that no specific amount was mentioned. Viewed in the light of the attending facts and circumstances, the clear import of the phrase "a certain sum" was that respondent had received a substantial amount. There was persuasive evidence (*supra*, pp. 11–12) to negative the claim. The trial court was sufficiently impressed with this line of proof to make it the basis of an instruction (*supra*, pp. 16–17). The court below erred, we believe, in substituting its finding that the statements did not measure up to a "calculated misrepresentation" for the permissible inference to the contrary which the jury may well have drawn from the evidence. See *United States* v. *Adonis*, *supra*.

Thirdly, there was affirmative evidence tending to show that graft was a likely source of respondent's new found wealth. The proof in this respect centered on respondent's position as a police officer with rank in a large metropolitan area, and on his admissions of graft-taking in pre-indictment years which, as we shall show (*infra*, pp. 35–40), were both relevant and corroborated. This line of proof was brought into sharp focus by the evidence relating to respondent's personal and financial history in both the pre-indictment and the prosecution years. That respondent took graft in pre-indictment years is shown by his own admissions. That he continued to do so during the prosecution years is surely a legally permissible inference from this record. Compare *United States* v. *Johnson*, 319 U. S. 503; *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2d).

It may be argued that any one of these lines of proof (together with proof of a reasonably certain opening net worth) was alone sufficient to satisfy the evidentiary requirements laid down in *Holland*. Be that as it may, it is submitted that, considered in their totality, the proofs here were more than adequate to establish a prima facie showing that the increases in respondent's net worth were attributable to currently taxable income. And this is so even if only the first and second lines of proof are considered—*i. e.*, without the third line of proof consisting of the source evidence (which the court below held inadmissible in part). Accordingly, the trial court properly denied respondent's motion for judgment of acquittal.

## II

### THE COURT BELOW ERRED IN HOLDING THAT RESPONDENT'S ADMISSIONS OF GRAFT-TAKING IN PRE-INDICTMENT YEARS SHOULD HAVE BEEN EXCLUDED

As already pointed out (*supra*, p. 18), the basic premise of the decision below is that "proof of a likely source is an indispensable element of the net worth method in any of its applications." Certainly the court's view as to the importance of the source evidence had a vital bearing on how the court resolved the question of the admissibility of certain admissions made by respondent as to graft-taking in the pre-indictment years. But, irrespective of the validity of the court's premise on the source question,[15] we submit that the court erred in holding that the admissions should have been excluded.

#### A. THE ADMISSIONS WERE RELEVANT

Although holding that proof of a likely source (*i. e.*, graft in this case) was indispensable, the court below (Judge Woodbury dissenting) held that the admissions of graft-taking by respondent in pre-indictment years were irrelevant and should have been excluded. It based this holding (R. 804) on the general rule of exclusion that "upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible". In the court's

[15] Even if the decision below were correct as to the necessity of proving a likely source, we believe that the Government's evidence in this regard is sufficient to meet such a requirement.

view, there was no evidence to connect the admissions of graft-taking in pre-indictment years with the prosecution's case. This, we believe, was error.

The general rule and the established exceptions are well stated in *Bracey* v. *United States*, 142 F. 2d 85, 87–88 (C. A. D. C.), certiorari denied, 322 U. S. 762, which is cited by the court below:

> The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged, is inadmissible. However, there are many well established exceptions to this rule, raised by the special circumstances of particular cases; to the end that all relevant facts and circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused may be made to appear. Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged. Such evidence is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive.

Thus, as Judge Woodbury pointed out in his dissenting opinion, the mere fact that the admissions constituted evidence of the commission of a crime other

than the one for which respondent was on trial did not necessarily render the evidence inadmissible.

Here, the evidence relating to the admissions (*supra*, pp. 8–11) clearly falls within the established exceptions. The evidence of graft-taking was "so blended or connected" with the crime of tax evasion that proof of one incidentally involved the other. The admissions not only tended to explain the circumstances of the crime charged but also, to the extent that the admissions tended to show a likely source of unreported income, they constituted evidence supporting the inference that respondent's net-worth increases were attributable to taxable income. It must not be overlooked that the essential fact of the admissions was graft-taking, although during pre-indictment years.

The majority of the court below, in viewing the admissions as wholly unconnected with the crime charged, failed to credit the facts of record and to accord fair inferences to them. It can hardly be disputed that the admissions tended to show a predisposition on the part of respondent to take graft. Likewise undisputed is the fact of his continued employment, and at higher rank, as a police officer. Equally telling is the otherwise unexplained net-worth increases revealed by the record. In short, the proofs revealed a predisposition and the continuing opportunity for, as well as the likely fruits of, graft-taking. It seems unrealistic to say, as do the majority below (R. 808), that because of the change in respondent's duty assignments there was no continuing opportunity for graft-taking in the prosecution years despite respondent's higher rank. If respondent could find opportunities

for graft as a motorcycle patrolman, the probabilities are that he had no difficulty in doing so as a sergeant and later a lieutenant in charge of the licensing board functions and responsible for seeing that other policemen carried out their duties.

In this respect, it should be emphasized that the strength of the inference which the jury was permitted to draw was not, as the majority opinion below suggests, grounded solely in the evidence of the admissions. It was the admissions coupled with the opportunity for graft-taking and the otherwise unexplained net-worth increases which furnished a basis for the inference. In the circumstances, surely it can not be said that the inference is so inherently implausible that the trial judge abused his discretion in failing to exclude the admissions as irrelevant.

B. THE ADMISSIONS WERE CORROBORATED

This Court has held that statements made by a taxpayer to investigating agents, after the fact, and relied upon by the Government to establish vital links in its net-worth proof, require corroboration. *Smith* v. *United States,* 348 U. S. 147; *United States* v. *Calderon,* 348 U. S. 160. The necessary corroboration may be provided by independent evidence which either bolsters the admissions or tends to establish the crime of tax evasion independent of the admission. *Smith* v. *United States, supra,* pp. 156–159. The corroborating evidence is sufficient if it "supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Opper* v. *United States,* 348 U. S. 84, 93.

In both *Smith* and *Calderon*, the statements of the taxpayer related to opening net worth. In *Smith* the Court found the requisite corroboration of the admissions as to opening net worth in independent evidence of the taxpayer's personal and financial history in pre-indictment years. It also found corroboration in another line of proof—namely, the evidence of expenditures by the taxpayer during the prosecution years far in excess of reported income, when coupled with proof of a business producing unrecorded amounts of income—since this evidence tended to establish the crime of tax evasion independent of the admission. In *Calderon* the Court held that, although the evidence of the taxpayer's financial history in pre-indictment years was too sketchy to corroborate the opening net worth directly, the evidence as to his financial history and business dealings during the prosecution years provided (p. 167) "sufficient independent evidence of the crime of tax evasion to corroborate his statements * * *."

Here, the admissions related to graft-taking by respondent in pre-indictment years when he was a motorcycle patrolman and on the vice squad. To corroborate the admissions, the Government presented a large body of independent evidence relating to the personal and financial history of respondent and his wife prior to (and during) the prosecution years. This evidence, in broad outline, included proof of respondent's duty assignments as a police officer and of his salary as such; proof of his income tax payments; proof of deposits and expenditures made by him or his wife in

pre-indictment years in amounts far in excess of the declared available resources; and proof of an opening net worth of some $61,000 which could not be accounted for by nontaxable receipts. This evidence, similar in kind to that presented in *Smith* and *Calderon*, was ample to corroborate the admissions. The trustworthiness of the admissions that respondent had taken graft in the pre-indictment years could hardly be established by more convincing independent evidence than the proof of expenditures by him in those years greatly in excess of reported income, culminating in an opening net worth of $61,000.

In rejecting the Government's contention that the admissions were amply corroborated by the independent evidence of respondent's personal and financial history in pre-indictment years, the court below said (R. 808) that "[*o*]*nly independent evidence of some actual graft taking* or, at least, opportunity for graft taking could serve as sufficient corroboration * * *." (Emphasis added.) If this statement constitutes a holding that judicial admissions must be corroborated by *direct* evidence, then the decision is contrary to the pronouncements of this Court in the *Smith, Calderon*, and *Opper* cases. If, on the other hand, the court's statement means that there is no independent evidence in the record showing "opportunity for graft taking" by respondent in pre-indictment years, then the court has failed to credit the facts of record. We note in this respect that the court earlier in its opinion recognized (R. 805) that respondent "had opportunities open to him for graft" during the pre-indictment

years when he was a motorcycle patrolman and on the vice squad.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals.[16]

J. LEE RANKIN,
*Solicitor General.*

CHARLES K. RICE,
*Assistant Attorney General.*

EARL E. POLLOCK,
*Assistant to the Solicitor General.*

JOSEPH F. GOETTEN,
JOHN J. MCGARVEY,
*Attorneys.*

DECEMBER 1957.

---

[16] The court below did not pass on several issues raised by the respondent (see Br. in Opp. 6), and none of these issues appears appropriate for *de novo* disposition by this Court.